No. 81393-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT L. VANCE,

Respondent.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF RESPONDENT

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Portions of this brief have been redacted in accord with the Order of Department One on 9-29-09.

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A. SUMMARY OF ARGUMENT IN RESPONSE

In 2004, Robert Vance received an exceptional sentence in the form of consecutive sentences, based on a judicial finding that in light of his multiple current offenses, a standard-range sentence would be clearly too lenient. In In re Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), this Court held that because exceptional sentences imposed as consecutive sentences are subject to the same statutory procedures that were invalidated in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), defendants receiving such sentences have a right to a jury trial on aggravating factors. In light of VanDelft, Mr. Vance's exceptional sentence based on judicial fact-finding is invalid and must be reversed.

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Finally, where the Legislature prescribes that aggravating factors be proved to a jury beyond a reasonable doubt, an error in imposing a sentence based on judicial fact-finding cannot be harmless. Further, the jury's findings alone—that Mr. Vance committed multiple offenses against multiple victims—do not amount to a finding that a standard-range sentence would be clearly too lenient. Finally, the State may not seek an exceptional sentence on remand, as the specific aggravating factor the trial court relied upon in this case is not contained in the current statute, and therefore no statutory procedure exists to authorize the court to empanel a jury to consider that factor on remand.

B. ISSUES PRESENTED

1. Whether VanDelft, 158 Wn.2d 731, invalidates the exceptional sentence Mr. Vance received.

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3. Whether the error in imposing the exceptional sentence based on judicial fact-finding was harmless, where the Legislature prescribed that the aggravating factor be proved to a jury beyond a reasonable doubt.

4. Whether the State may seek an exceptional sentence on remand, where the statute does not authorize the trial court to empanel a jury to consider the specific aggravating factor at issue.

C. STATEMENT OF THE CASE

In July 2003, a jury convicted Robert Vance of three counts of first degree child molestation, two counts of second degree child molestation, and three counts of communication with a minor for immoral purposes. CP 19. The court initially sentenced Mr. Vance as a persistent offender, but that sentence was reversed on appeal due to an error in the offender score calculation. CP 56; 122 Wn. App. 1040, 2004 WL 1658630 (No. 53127-1, July 26, 2004).

Mr. Vance was resentenced on October 29, 2004. The trial court found that, based upon Mr. Vance's multiple current offenses, a standard-range sentence would be "clearly too lenient in light of

the purposes" of the SRA. RP 15-16; CP 21, 32-33. The court did not base the exceptional sentence on multiple victims and made no finding regarding multiple victims.

The court imposed the exceptional sentence in the form of consecutive sentences. RCW 9.94A.589(1)(a). The court imposed 198 months on each of the three first degree child molestation counts and ordered them to run consecutively to each other and concurrently with the other counts, for a total of 594 months confinement. RP 16-17; CP 24. The standard-range sentence was 149-98 months. CP 21.

Mr. Vance again appealed, arguing the exceptional sentence, imposed by a judge based on findings proved by a preponderance of the evidence, violated his Sixth and Fourteenth Amendment rights under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Court of Appeals affirmed, in light of the apparent authority of State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005). Soon afterward, however, this Court issued its decision in In re Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), cert. denied, __ U.S. __, 127 S.Ct. 2876, 167 L.Ed.2d 1172 (2007). This Court granted Mr.

Vance's petition for review and remanded to the Court of Appeals for reconsideration in light of VanDelft.

The Court of Appeals reversed its decision and held the exceptional sentence was invalid in light of VanDelft. State v. Vance, 142 Wn. App. 398, 174 P.3d 697 (2008). The court further concluded that the State could not seek an exceptional sentence on remand, because the aggravating factor on which the trial court had relied is not found in the new statute, RCW 9.94A.535(3), and thus no statutory procedure currently exists to authorize the court to submit the factor to a jury. Id. at 407-09. Alternatively, the State could not seek an exceptional sentence on remand, because the State had not provided pretrial notice of its intention to seek an exceptional sentence, as required by RCW 9.94A.537(1). Id. at 409 (citing State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007)). Thus, the court remanded for imposition of a sentence within the standard range. Id. at 411-12.

The State petitioned for review, arguing the error in imposing the exceptional sentence was harmless or, alternatively, that it could seek an exceptional sentence on remand.

While the State's petition was pending, the United States Supreme Court granted certiorari in Oregon v. Ice, __ U.S. __, 128

S.Ct. 1657, 170 L.Ed.2d 353 (2008), to consider whether the Sixth Amendment, as construed in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely, 542 U.S. 296 (2004), required that facts (other than prior convictions) necessary to imposing consecutive sentences be found by a jury or admitted by the defendant. Id. The State filed a supplemental petition for review in this case, requesting review of that issue.

The United States Supreme Court then issued its decision in Ice, holding that, because the jury traditionally played no part in deciding whether to impose consecutive sentences, the Sixth Amendment did not preclude a trial judge from making the predicate findings necessary to impose consecutive sentences. Ice, __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009).

The Court granted the State's petition for review and its supplemental petition for review.

D. ARGUMENT

1. MR. VANCE'S EXCEPTIONAL SENTENCE IS INVALID IN LIGHT OF VANDELFT AND THE LEGISLATURE'S INTENT THAT ALL DEFENDANTS WHO RECEIVE EXCEPTIONAL SENTENCES BE GRANTED THE SAME PROCEDURAL RIGHTS

In Washington, since enactment of the SRA, a judge's discretion to impose consecutive sentences for multiple current

offenses has always been subject to the same statutory constraints and requirements as the decision to impose an aggravated sentence for a single offense.[1] RCW 9.94A.589(1)(a). Concurrent sentences are presumed and a departure from that presumption is an exceptional sentence. Id. In VanDelft, this Court concluded that because the procedures applied to all exceptional sentences were held invalid in Blakely, they are invalid when applied to exceptional sentences that take the form of consecutive sentences. VanDelft, 158 Wn.2d at 742. In light of VanDelft, Mr. Vance's exceptional sentence based on judicial fact-finding is invalid.

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[1] Aside from two narrow exceptions: where a person is "convicted of two or more serious violent offenses arising from separate and distinct criminal conduct," or is convicted of certain firearm offenses. RCW 9.94A.589(1)(b), (c).

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a. The sentence is invalid in light of *VanDelft*. In VanDelft, this Court concluded that the aggravating factors underlying an exceptional sentence imposed as a consecutive sentence must be found by a jury beyond a reasonable doubt. 158 Wn.2d at 743. The Court distinguished its earlier decision in State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005), in which it had held that the factual finding necessary to impose consecutive sentences for serious violent offenses under RCW 9.94A.589(1)(b) need not be proved to a jury beyond a reasonable doubt. Id. at 741-42. In VanDelft, the Court made clear that the key distinction between the sentencing scheme in Cubias and the scheme at issue in VanDelft is that consecutive sentences imposed under RCW 9.94A.589(1)(a) are *exceptional* sentences. Id. at 742-43.

In VanDelft, as in this case, the trial court imposed an exceptional sentence in the form of consecutive sentences based on the judge's finding that, in light of the multiple current offenses, a standard-range sentence would be "clearly too lenient." VanDelft, 158 Wn.2d at 735; RCW 9.94A.589(1)(a). VanDelft recognized that in Washington, the statutory presumption is that sentences for

multiple nonserious violent felonies are to be served concurrently. Id. at 739. A departure from that presumption is an exceptional sentence, that is, a sentence beyond the "statutory maximum." Id. at 741. VanDelft also recognized that the same statutory procedures that apply to exceptional sentences for a single offense apply when the exceptional sentence takes the form of consecutive sentences for multiple offenses, and that these are the same procedures invalidated in Blakely. Id. at 742. Thus, VanDelft concluded, defendants who receive exceptional sentences in the form of consecutive sentences have a right to have aggravating factors proved to a jury beyond a reasonable doubt. Id. at 743.

In light of VanDelft, Mr. Vance's exceptional sentence, based on judicial fact-finding, is invalid.

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2. THE ERROR IN IMPOSING THE EXCEPTIONAL SENTENCE WAS NOT HARMLESS

a. Where a court imposes an exceptional sentence based on judicial fact-finding, but the Legislature prescribed the aggravating factor be proved to a jury beyond a reasonable doubt, the error cannot be harmless. Where the sentence to be imposed relies upon a particular factual finding, it is up to the Legislature to establish the procedure for courts to follow in making the required finding. Hughes, 154 Wn.2d at 150-51. Courts may not deviate from the legislatively prescribed exceptional sentencing procedures, whether at trial or on remand. State v. Davis, 163 Wn.2d 606, 608, 184 P.3d 639 (2008). This Court has consistently held that, where a court imposes a sentence by applying a procedure that is not authorized by the Legislature, the error cannot be harmless. See, e.g., id. at 615-16.

As discussed, the Legislature prescribed that all exceptional sentences be based on aggravating factors that are proved to a jury beyond a reasonable doubt. Because the sentence imposed was based on judicial fact-finding, it is in excess of statutory authority and must be reversed.

b. The jury's finding of multiple victims does not amount to a finding that a standard-range sentence would be clearly too lenient. The State contends the jury's findings that there were multiple victims as a matter of law amounts to a finding that a standard-range sentence would be clearly too lenient. But the sentencing court did not rely on the fact there were multiple victims and the sentence therefore cannot be affirmed on that basis.

In reviewing an exceptional sentence above the standard range, the appellate court may ask only whether the reasons relied upon by the sentencing court are supported by the record, whether they justify an exceptional sentence as a matter of law, and whether the sentence is clearly excessive. State v. Jackson, 150 Wn.2d 251, 273-74, 76 P.3d 217 (2003). Here, in imposing the exceptional sentence, the court relied on the fact there were multiple offenses and that Mr. Vance would "receiv[e] no actual sanction for many of the current offenses if he were to receive a standard range sentence." CP 33; former RCW 9.94A.535(2)(i) (2003). The court did not rely on the fact of multiple victims. Because a reviewing court may not affirm an exceptional sentence based on a reason not relied upon by the sentencing court, this Court may not affirm the exceptional sentence on that basis.

Moreover, in Hughes, this Court held the "clearly too lenient" finding must be left to the jury's judgment and cannot follow as a matter of law from the fact there are multiple current offenses. 154 Wn.2d at 137-38, 140 (rejecting earlier holdings of State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991) and State v. Smith, 123 Wn.2d 51, 864 P.2d 137 (1993), that factual inquiry required to find presumptive sentence clearly too lenient is "automatically satisfied whenever 'the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free' crimes.'"); cf. State v. Suleiman, 158 Wn.2d 280, 292-93, 143 P.3d 795 (2006) (rejecting State's argument that aggravating factor of particular victim vulnerability follows as matter of law from stipulated fact that defendant drove more aggressively in response to victim passenger's pleas that he slow down). Likewise, the "clearly too lenient" finding cannot follow as a matter of law from the jury's finding there were multiple victims.

3. THE STATE MAY NOT SEEK AN EXCEPTIONAL SENTENCE ON REMAND

In Hughes, this Court held that where the Legislature has not created a procedure for juries to find aggravating factors and instead explicitly provided for judges to do so, the court may not

imply such a procedure on remand. 154 Wn.2d at 150 (citing State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980)); Pillatos, 159 Wn.2d at 470 ("trial courts do not have inherent authority to empanel sentencing juries"); Davis, 163 Wn.2d at 614-15 (and cases cited therein). These cases dictate that the State not be given an opportunity to prove the aggravating factor to a jury on remand, as there is no statutory procedure that would allow the trial court to convene a jury for that purpose.

The 2007 legislation specifically provides that the trial court may convene a jury on remand to consider *only* those aggravating circumstances listed in RCW 9.94A.535(3) that were relied upon by the superior court in imposing the previous sentence. Laws of 2007, ch. 205, § 2(2).[3] The State concedes the "multiple offense" aggravating factor contained in the new statute, RCW 9.94A.535(2)(c), cannot be constitutionally applied in this case,

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[3] That section provides:

> In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

Laws of 2007, ch. 205, § 2(2).

because it decreases the proof required for imposition of an exceptional sentence and would result in an ex post facto violation. See State v. Schmidt, 143 Wn.2d 658, 672-73, 23 P.3d 462 (2001). The "clearly too lenient" aggravating factor is not listed in RCW 9.94A.535(3). Moreover, all of the relevant case law, from Hughes and its predecessors, to Pillatos and Davis, teaches that the trial court has no inherent authority to convene a jury to find this particular aggravating factor.

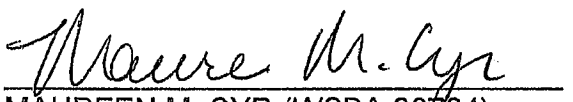
In some cases, the court may fashion a procedure to impose a sentence where the statute is silent or ambiguous with respect to the relevant procedure. Davis, 163 Wn.2d at 613. But there should be no dispute that the Legislature's omission of the "clearly too lenient" factor from the new legislation was intentional. In 2005 the Legislature explicitly amended RCW 9.94A.535 to allow the sentencing court, rather than a jury, find the aggravating circumstance that "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). The "clearly too lenient" aggravating factor no longer exists. See RCW 9.94A.535(3) (providing *exclusive* list of aggravating factors that may be found by a jury). It cannot be doubted that the

Legislature's decision to transform this aggravating factor into one that need not be submitted to a jury was intentional. Therefore, the court may not fashion a procedure to enable it to empanel a jury on remand to find the aggravating factor and must instead impose a standard-range sentence.

E. CONCLUSION

The Legislature has prescribed that defendants receiving exceptional sentences in the form of consecutive sentences receive a right to a jury trial on aggravating factors and therefore Mr. Vance's sentence, based on judicial fact-finding, is invalid and must be reversed. Because no statutory procedure exists to enable the court to submit the specific aggravating factor to a jury on remand, the court must impose a standard-range sentence.

Respectfully submitted this 15th day of May, 2009.



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